Supreme Court, U.S.
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No. _____

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1997

CHARLES GUNN,

Petitioner,

vs.

UNITED STATES DEPARTMENT OF AGRICULTURE,
NATURAL RESOURCES CONSERVATION SERVICES,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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86pp.

QUESTION PRESENTED

If Congress' exemption for "converted wetland" from the "swampbuster" provisions of the Food Security Act of 1985, is clear and unambiguous, did the Eighth Circuit of Appeals require the Respondent to apply Congress' exemption?

TABLE OF CONTENTS

	Page
Question Presented.....	ii
Table Of Authorities.....	iii
Opinions Below.....	1
Jurisdiction.....	2
Statutory And Regulatory Provisions.	2
Introduction.....	3
Statement Of The Case.....	13
A. Nature Of The Case.....	13
B. Proceedings Before The USDA.	14
C. Proceedings In The District Court.....	17
D. Proceedings In The Court Of Appeals.....	18
Reason For Granting The Writ.....	18

This case presents an important question of federal law that has not been, but should be, settled by this Court; i.e., must the Eighth Circuit Court of Appeals require the Respondent to apply the clear and unambiguous Congressional exemption for "converted wetland" from the "swampbuster"

Page

provisions of the Food Security Act of 1985?

Conclusion..... 28

Appendix..... App. 1

Order Denying Petition For Rehearing En Banc..... App. 1

Eighth Circuit Panel Decision..... App. 2

District Court Decision... App. 21

8-19-1997 Affidavit Of Charles Gunn..... App. 30

1-30-1996 Affidavit Of Charles Gunn..... App. 33

4-26-1991 Wetland Conservation Determination..... App. 37

11-13-1992 Wetland Conservation Determination..... App. 38

5-10-1993 Wetland Conservation Determination..... App. 39

10-31-1994 Wetland Conservation Determination..... App. 40

Statutory And Regulatory Provisions..... App. 41

Page

16 U.S.C. Section 3801(a)(6)(A)(definition of "converted wetland")..... App. 41

16 U.S.C. Section 3801(a)(18)(definition of "wetland")..... App. 42

16 U.S.C. Section 3821(a) (ineligible for production on converted wetland)..... App. 43

16 U.S.C. Section 3822(b)(1)(A)(exemption for "converted wetland" commenced before December 23, 19875. App. 44

7 C.F.R. Section 12.5(d) (exemption for "converted wetland")..... App. 45

7 C.F.R. Section 12.2(a)(6) (definition of "converted wetland")..... App. 46

7 C.F.R. Section 12.32 ("converted wetland" identification criteria"). App. 47

TABLE OF AUTHORITIES

Cases: **Page(s)**

Asgrow Seed Co. v. Winterboer, ___ U.S. ___, 115 S.Ct. 788 (1995)..... 21

Chemical Manufacturers Ass'n v. Natural Resources Defense Council, Inc., 470 U.S. 116 (1985)..... 18

Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984)..... 18, 20

Leovy v. United States, 177 U.S. 621 (1900)..... 7

Mallard v. U.S. Dist. Court For Southern Dist. of Iowa, 490 U.S. 296 (1989)..... 20

Mead Corp. v. Tilley, 490 U.S. 714 (1983)..... 20

U.S. Nat. Bank of Or. v. Independent Ins. Agents, 508 U.S. 439 1983)..... 21

Statutes: **Page(s)**

16 U.S.C. Sections 718a-718j..... 10

16 U.S.C. Section 1301-1311..... 10

16 U.S.C. Section 3801(a)(4)(A).. 2, 20

16 U.S.C. Section 3801(a)(8)..... 5

16 U.S.C. Section 3801(a)(9)..... 5

16 U.S.C. Section 3801(a)(18).... 3

16 U.S.C. Section 3821(a)..... 3, 23

16 U.S.C. Section 3822(b)..... 13

16 U.S.C. Section 3822(b)(1)(A).. .....3, 13, 19, 25

16 U.S.C. Section 3844..... 12

16 U.S.C. Sections 3901-3932..... 10

28 U.S.C. Section 1254(1)..... 2

33 U.S.C. Sections 1251-1387..... 10

Regulations: **Page(s)**

7 C.F.R. Section 12.2(a)(6)..... 3, 22

7 C.F.R. Section 12.32..... 3

7 C.F.R. Section 12.32(a)(3)..... 22

7 C.F.R. Section 12.4(c)..... 11

7 C.F.R. Section 12.4(a)(1)..... 12

7 C.F.R. Section 12.5(b)(ii)..... 12

7 C.F.R. Section 12.5(d)..... 3

7 C.F.R. Section 122(a)(b)..... 22

Iowa Code, Section 468.1 (1995).. 9

Iowa Code, Section 468.2(1)..... 9

Iowa Code, Section 468.2(2)..... 9

Other Authorities: **Page(s)**

20 Drake L. Rev. 256, The Law Of Water Distribution In Iowa And South Dakota, A Comparison Of The Riparian And Appropriative Systems By Max A. Gors..... 9

33 Words and Pharases, "Possible" 21

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Black's Law Dictionary, p. 699 (6th Ed. 1990)..... 27

Black's Law Dictionary, p. 1166 (6th Ed. 1990)..... 21

Steven Dickerson, The Evolving Federal Wetlands Program, 44 SW. L. J. 1473-74 (1991)..... 6

Joan M. Ferretti, Restoring The Nations Wetlands: Can The Clean Water Acts Dredge And Fill Guidelines Do The Job?, 1 Pace Envtl. L. Rev. 105, 105, 106 (1983)..... 6

Fish And Wildlife Service, Environmental Protection Agency, Dep't Of The Army, & Soil Conservation Service, Federal Manual For Identifying And Delineating Jurisdictional Wetlands Section 2.6 (1989)..... 4

Elinor L. Horwitz, Counsel On Environmental Quality, Our Nations Wetlands 6 (1978)..... 6

Iowa Dep't Of Natural Resources, Fish and Wildlife Div., Iowa Prairie Pothole Joint Venture Implementation Plan III (1990)... 8

Mary Ann Lee & Graham A. Tobin, An Evaluation Of Wetlands And Wetland Policies In Iowa, 22 (1982)..... 8

John G. Lyon, Practical Handbook For Wetland Identification And Delineation 20, 24 (1993)..... 5

Report of House Committee on Agriculture, Page 419, July 31, 1995..... 26

Report of House Committee on Agriculture, Page 419, September 30, 1995..... 28

David Salvesen, The Urban Land Institute, Wetlands: Mitigating and Regulating Development Impacts 1, Page 1 (1990)..... 7

U.S.C. Congressional and Administrative News, 99th Congress -- First Session, 1985, Volume 1, Page 2386..... 23

U.S.C. Congressional and Administrative News, 99th Congress -- First Session, 1985, Volume 3, Page 2386..... 23

William L. Want, Law Of Wetlands Regulation, Section 2.02(1), n. 29, (1989)..... 7

Michael Williams, Wetlands: A Threatened Wetlands, n. 11, at 2. 6

Michael Williams, Wetlands: A Threatened Landscape 7-9 (1990).. 4

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PETITION FOR WRIT OF CERTIORARI

Charles Gunn, the Petitioner herein, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in the above-entitled case on July 7, 1997.

OPINIONS BELOW

The July 7, 1997, opinion of the Court of Appeals, whose judgment is herein sought to be reviewed, is reported

at 118 F.3d 1233 (8th Cir. 1997) and is reprinted in the attached Appendix to this Petition at App. pp. 2-20.

The prior opinion of the United States District for the Southern District of Iowa, Central Division, entered September 19, 1996, No. 4-95-CV-80373, is not published in a reporter, and is reprinted in the attached Appendix to this Petition at App. pp. 21-29.

JURISDICTION

The Judgment of the Court of Appeals for the Eighth Circuit was entered on the 7th day of July, 1997. On August 19, 1997, Petitioner filed a Petition For Rehearing En Banc. On September 8, 1997, the Eighth Circuit denied Petitioner's Petition For Rehearing En Banc. (App. p. 1). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254(1).

STATUTORY AND REGULATORY PROVISIONS

The statute defining what land is exempt from the "swampbuster" provisions of the Food Security Act of 1985[1], is at 16 U.S.C. Section 3801(a)(4)(A)(App. p. 41).

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[1] Food Security Act of 1985, Public Law no. 99-198, 99 Stat. 1354. its provisions are codified at 16 U.S.C. Sections 3801 through 3849. Swampbuster provisions are codified at 16 U.S.C. Sections 3821-3823.

The statute describing what land is covered by the "swampbuster" provisions of the Food Security Act of 1985, is at 16 U.S.C. Section 3801(a)(18)(App. p. 42).

The statute making production of an agricultural commodity on wetland converted after December 23, 1985, ineligible for USDA programs is at 16 U.S.C. Section 3821(a)(App. p. 43).

The statute exempting converted "wetland" from the "swampbuster" provisions of the Food Security Act of 1985, is at 16 U.S.C. Section 3822(b)(1)(A)(App. p. 44).

The agency regulation meant to implement the statute's exemption of"converted wetland" is at Paragraph 7 C.F.R. Section 12.5(d)(App. p. 45).

The agency regulation meant to implement Congress' definition of "converted wetland" is at Paragraph 7 C.F.R. Section 12.2(a)(6)(App. p. 46).

The agency regulation meant to assist in the identification of "converted wetland" is at Paragraph 7 C.F.R. Section 12.32 (App. p. 47).

INTRODUCTION

Wetlands cover a large area of the United States. Wetlands are found in all

forty-eight lower states.[2]

Wetlands are transitional areas, lying between identifiable bodies of water and dry land.[3] Most scientists agree that wetland areas are characterized by the presence of: (1) Hydric soils,[4] which are typically saturated with water during much of the growing season; (2) Hydrophytic vegetation,[5] which is adapted to or tolerant of saturated soil; and (3) Sufficient water to support such

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[2] See Footnote 12, below.

[3] See Michael Williams, Wetlands: A Threatened Landscape 7-9 (1990).

[4] Hydric soils are "soils that are saturated, flooded, or ponded long enough during the growing season to develop anaerobic conditions in the upper part." See Fish And Wildlife Service, Environmental Protection Agency, Dep't Of The Army, & Soil Conservation Service, Federal Manual For Identifying And Delineating Jurisdictional Wetlands Section 2.6 (1989)[Hereafter 1989 Federal Manual].

[5] Hydrophytic vegetation refers to: "Macrophytic plant life growing in water, soil or on a substrate that is at least periodically deficient in oxygen as a result of excessive water content". 1989 Federal Manual Section 2.1.

vegetation.[6] For purposes of the Food Security Act of 1985, Congress defined hydric soil and hydrophytic vegetation at 16 U.S.C. Sections 3801(a)(8) and (9), respectively. The United States Fish & Wildlife Service has divided wetlands and associated deep water habitats into five ecological systems: (1) Marine, (2) Estuarine, (3) Riverine, (4) Lacustrine, and (5) Palustrine.[7] Wetlands can be further classified according to their dominant vegetation.[8]

The Palustrine System encompasses the vast majority of this countries inland marshes, bogs and swamps.[9] Portions of Petitioner's farm, in its natural state (i.e., prior to their conversion to crop ground in 1906) is known as Palustrine emergent wetlands which is dominated by grasses, rushes and sedges.[10]

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[6] See John G. Lyon, Practical Handbook For Wetland Identification And Delineation 20, 24 (1993).

[7] See U.S. Fish And Wildlife Service, Wetlands Of The United States: Current Status And Recent Trends 5 (1984) [Hereafter Current Status].

[8] See Current Status.

[9] See current status.

[10] These wetlands are called marshes, wet meadows, fens or inland salt marshes, depending on the region of the country

Until recently, wetlands were considered to be unproductive and even hazardous when left in their natural state. [11] Consequently, during the 19th and much of the 20th Century, both Federal and State Governments encouraged the sale and reclamation of wetlands so that they could be converted to more productive uses.[12] Reflecting this

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and the particular characteristics of the wetland area. See Elinor L. Horwitz, Counsel On Environmental Quality, Our Nations Wetlands 6 (1978) and Current Status at 9.

[11] See Michael Williams, Wetlands: A Threatened Landscape, Note 11, at 2; Steven L. Dickerson, The Evolving Federal Wetlands Program, 44 Sw. L. J. 1473-74 (1991) ("Wetlands have historically been regarded as wastelands, fit only for the breeding of mosquitoes, flies, and snakes."); Joan M. Ferretti, Restoring The Nations Wetlands: Can The Clean Water Acts Dredge And Fill Guidelines Do The Job?, 1 Pace Envtl. L. Rev. 105, 105-106 (1983)(In the past, wetlands were seen as unproductive until drained or filled).

[12] A 1990 study by the United States Fish and Wildlife Service estimates that by 1980, 53% of the 221 million acres of wetlands that existed in the lower 48 states in 1780 had been converted to farmland or other productive uses. U.S. GEN. ACCOUNTING OFFICE, WETLANDS OVERVIEW

attitude, almost 100 years ago this Court characterized wetlands as "the cause of malarial and malignant fevers" and opined that "the police power is never more legitimately exercised than in removing such nuisances." Leovy v. United States, 177 U.S. 621, 636, 20 S.Crt. 797, 803, 44 L.Ed. 914 (1900).

The widespread drainage of surface water in Iowa began shortly after enactment of the Federal Swamplands Act of 1849.[13] Under the 1849 Act and related

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11 (1991). Washington, D.C., Philadelphia, New York City, and several of the nation's largest coastal cities were built on wetlands. David Salvesen, The Urban Land Institute, Wetlands: Mitigating and Regulating Development Impacts 1, Page 1 (1990). Much of the conversion was encouraged by the Swamp Lands Acts of 1849, 1850, and 1860, in which Congress granted 65 million acres of wetlands to western states for "swamp reclamation". William L. Want, Law of Wetlands Regulation, Section 2.02(1), n. 29 (1989).

[13] Richard A. Bishop, Iowa's Wetlands, 88(1) Proc. of the Iowa Acad. of Sci. 11, 11 (1981). The State of Iowa originally contained an estimated 4 million acres of wetlands, an area equivalent to 11% of its total surface area. U.S. Dep't of the Interior, Fish and Wildlife Service, Wetland Losses in the United States; 1790's to 1980's, 6

legislation in 1850 and 1860, the Federal Government transferred 1.2 million acres of public domain wetlands to Iowa's prairie settlers for conversion to cropland.[14] Landowners drained the land by constructing ditches to speed the removal of surface water and later by installing subsurface tile waterways.[15]

Even today, Iowa law continues to provide two major sources of support for

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(1990). Most of Iowa's wetlands were small depressional wetlands, called "prairie potholes" created by glaciers that pushed across the northern portion of Iowa as recently as 13,000 years ago. Today, 95% to 98% of the state's original "prairie potholes" and other natural wetlands have been converted to farmland or other productive uses.

[14] Mary Ann Lee & Graham A. Tobin, An Evaluation Of Wetlands And Wetland Policies In Iowa, 22 (1982); Bishop Supra note 14, 11.

[15] Iowa Dep't of Natural Resources, Fish and Wildlife Div., Iowa Prairie Pothole Joint Venture Implementation Plan III (1990). The Reconstruction Finance Corporation (1935), the Flood Control Act (1944), and the Federal Watershed and Flood Prevention Act (1954) all supplied funds and technical assistance for the construction of drainage facilities throughout the United States and helped make possible the conversion of millions of acres of wetlands.

surface water drainage; (1) common-law and statutory protection of an individuals right to drain the land and (2) statutory authorization for the establishment of drainage districts.[16] The government's policy of encouraging the conversion of wetlands to croplands has been extremely successful. According to the United States Fish and Wildlife Service estimates, more than 85% of the wetlands converted between the mid-1950s and the mid-1970s were converted as a result of agricultural practices.[17]

Recently concerns about the environment has translated into

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[16] See 20 Drake L. Rev. 256, The Law Of Water Distribution In Iowa and South Dakota, A Comparison of the Riparian and Appropriative Systems By Max A. Gors; and Iowa Code Chapter 468 (1995). Section 468.1 gives the Board of Supervisors of each Iowa county the authority to establish drainage districts. Section 468.2(1) states that the drainage of surface waters from agricultural lands is presumed to be a benefit to the public and conducive to the public health, convenience, and welfare. Section 468.2(2) states that the provisions for drainage districts are to be "liberally construed to promote levying, ditching, draining, and reclamation of wet, swampy, and overflow lands."

[17] U.S. Fish And Wildlife Service, Wetlands of the United States: Current Status and Recent Trends 28 (1984).

legislation. The first major legislation was the Federal Water Pollution Control Act, Chapter 758, 62 Stat. 1155 (1948).[18] The first major piece of legislation directed toward agriculture wetlands was

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[18] This Act, commonly known as the Clean Water Act, is codified, as amended, at 33 U.S.C. Sections 1251-1387. The Clean Water Act is but one piece of legislation where Congress has acted to save remaining wetlands. Several Statutes authorize the Federal Government to acquire title to wetlands or to purchase easements to protect wetlands. For instance, the Migratory Bird Hunting Stamp Act, 16 U.S.C. Section 718a-718j (1988), requires hunters of migratory waterfowl to purchase licenses. The proceeds from the sale of the licenses are used to purchase wetlands and surrounding areas for use as refuges for waterfowl protection areas. Similarly, the Emergency Wetlands Resources Act of 1986, 16 U.S.C. Sections 3901-3932 (1988) & Supp. 4 (1992), authorizes the Federal Government to charge fees for admissions to wildlife refuges and to use the funds to purchase wetlands or interest in wetlands. The Water Bank Act, 16 U.S.C. Sections 1301-1311 (1988), authorizes the Secretary of Agriculture to purchase ten-year easements on wetlands and adjacent areas. In exchange for an annual payment, owners of wetlands agree to not drain, fill, or otherwise destroy their wetlands, and to implement conservation plans and practices to protect the wetland habitat.

that portion of the Food Security Act of 1985 commonly known as "swampbuster".[19]

Swampbuster prohibits farmers who convert wetlands into cropland after December 23, 1985, from participating in and receiving benefits from most USDA programs. See 16 U.S.C. Sections 3821 thru 3823. Swampbuster did not make it illegal to convert wetlands to agricultural use but it established financial incentives so strong that most farmers had little choice but to comply. For example, if, while farming 1,000 acres, the farmer converts one acre of wetlands to agricultural use, the farmer lost eligibility to participate in farm government programs for the entire 1,000 acres; not just the one acre converted. Conversion of wetlands (with some exceptions not relevant here) results in a farmers loss of eligibility for (1) price and income supports, (2) disaster payments, (3) crop insurance, (4) FmHA loans, (5) Commodity Credit Corporation storage payments, (6) farm storage facility loans, (7) conservation reserve program and annual payments, and (8) dairy refund payments. 16 U.S.C. Section 3821(1). 7 C.F.R. Section 12.4(c).

Beginning December 23, 1985, the

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[19] Food Security Act of 1985, Public Tub. Law No. 99-198, 99 Stat. 1354. Its provisions are codified at 16 U.S.C. Sections 3801 through 3849. Swampbuster provisions are codified at 16 U.S.C. Sections 3821-3823.

event that triggered the loss of USDA program benefits was the producing of an agricultural commodity on a converted wetland. Since then, an additional triggering event was added by Congress. Effective November 28, 1990, USDA program benefits are lost if there is either the producing of an agricultural commodity on a converted wetland or the actual conversion of a wetland to agricultural use. 16 U.S.C. 3821; 7 C.F.R. Section 12.4(a)(1). The conversion of wetlands for purposes other than the production of an agricultural commodity does not result in the loss of USDA program benefits. 7 C.F.R. Section 12.5(b)(ii).

Swampbuster is supplemented by USDA regulations.[20] In addition, to assist it in making its decisions, the USDA uses USDA Agency Manuals[21] and a Federal Manual.[22]

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[20] 16 U.S.C. Section 3844; 7 C.F.R. Part 12.

[21] Agricultural Stabilization and Conservation Service Highly Erodible Land Conservation And Wetland Conservation Provisions (1986) and Soil Conservation Service, National Food Security Act Manual interpreting and explaining USDA regulations.

[22] Federal Manual For Identifying And Delineating Jurisdictional Wetlands, 56 Fed. Reg. 40,446 (proposed August 14, 1991)(hereafter Federal Manual).

Initially, Congress exempted four types of wetlands from swampbuster regulation. 16 U.S.C. Section 3822(b). Of the four, only the first is involved in this petition; i.e., "Swampbuster" does not apply to "converted wetlands", i.e., wetlands on which a conversion to crop ground was commenced before December 23, 1985. 16 U.S.C. Section 3822(b)(1)(A).

STATEMENT OF THE CASE

A. Nature Of The Case.

This petition involves Petitioner's assertion that the USDA did not follow the clear and unambiguous Congressional exemption of his "converted wetland" from the "swampbuster" provisions of the Food Security Act of 1985. This matter does not involve agency discretion. Gunn has continually, but to no avail, pointed out that the USDA's determination does not follow the clear and unambiguous Congressional intent.

Petitioner and his predecessors have farmed 160 acres of Iowa land since 1906. Prior to 1906, wet or swampy areas precluded the effective crop farming of all 160 acres. This changed with the installation of drainage tiling completed in 1906 by Greene County Drainage District No. 5. A 28-inch drainage tile main with two laterals attached was buried. From that time onward, all the ground (including the ground above the 28-inch main and laterals) has been farmed; i.e., none of the ground was left

in a wetland state. As farming practices changed, additional laterals were buried allowing for increased crop production. As early as 1947, the 28-inch main was insufficient to provide an outlet to drain the land adequately. The inadequacy was due to additional laterals hooked up to it both on Petitioner's land as well as other land draining into his. In 1992 the problem was corrected by replacing the 28-inch main with an open ditch. The USDA determined that the replacement constituted a conversion of wetlands. (App. pp. 33-36). Initially, the USDA classified 10.8 acres as "converted wetlands", but as each level of appeal passed, the USDA increased the number of acres until, at the last level, the USDA concluded 28.2 acres of Petitioner's crop land had been converted in violation of the Food Security Act of 1985. (App. pp. 37-40). After exhausting his administrative appeals Petitioner filed suit in the Federal District Court contesting the USDA's determination because the 1906 tiling constituted a "commenced" conversion intended by Congress to be exempt from "swampbuster". The District Court upheld the USDA's determination. Petitioner then appealed to the Eighth Circuit, but it, too, upheld the USDA's determination.

B. Proceedings Before The USDA.

By letter dated April 26, 1991, the SCS advised Petitioner that 32.9 acres of his farm was classified by it as "farmed wetlands". (App. p. 37). Gunn was advised that the existing drainage

systems on the "farmed wetlands" could be maintained, but not improved. Gunn, believing the acres were "prior converted" (because of the pre-December 23, 1985 tiling) appealed the decision. Gunn's appeal was considered and the classification was upheld. Gunn, still believing the proper classification to be "prior converted", appealed to the next level of agency review. After further review, the classification was upheld. At each level of the review, it was the SCS's position that because there was not sufficient tiling of the land to adequately drain the land and remove all wetland hydrology the land would not be classified "prior converted". Gunn did not appeal further. (App. pp. 22-23).

As early as January 25, 1991, the USDA became aware that the Trustees for the Drainage District that originally installed the 28-inch tile main were considering improvements to the 28-inch tile main.

When the Drainage District replaced the 28-inch tile main with the open ditch, a number of additional tile lines across Petitioner's property were discovered. An engineering analysis was requested and after review of the affect of the additional tile lines, the USDA determined it would uphold the original classification of "farmed wetlands" because (according to its guidelines) the newly discovered tile lines were still inadequate to provide a drainage coefficient that the USDA required to classify the area as "prior converted"

wetland. By letter dated November 13, 1992, the USDA notified Petitioner that even with the additional tile lines his tiling was still inadequate to provide the drainage level required by the SCS and the original call of "farmed wetland" would stand. But, due to the Drainage District activities, the 32.9 acres had been reclassified to 18.7 acres of "farmed wetland" and 14.2 acres of "converted wetland". (App. p. 38). Petitioner was told he could farm the 18.7 acres without loss of farm program benefits, but he could not farm the 14.2 acres without loss of farm program benefits. Petitioner appealed. After review, the USDA upheld its November 13, 1992 determination. Petitioner appealed. After further review, the determination was upheld, except that 5.3 acres was changed to the classification of "prior converted" wetland while the number of "farmed wetland" acres was reduced to 16.8 acres and the number of "converted wetland" acres was reduced to 10.8 acres (App. p. 39). Petitioner appealed. The classification of 10.8 acres as "converted wetland" precluded Petitioner from farming it in 1993, costing him an estimated $1,080.00. (App. p. 35). After further review, the USDA's determination was upheld but the classification was changed to 17.0 acres of "converted wetland" and 3.6 acres of "farmed wetlands". Petitioner appealed. The classification of 17.0 acres as "converted wetland" precluded Petitioner from farming it in 1994, costing him an estimated $1,740.00. (App. p. 35). By letter dated October 12, 1994, the last

level of agency review upheld the December 21, 1993 determination, however, the number of "farmed wetlands" acres was reduced even further to 4.5 acres while the number of "converted wetland" acres was increased to 26.4 acres and the "prior converted" acres was done away with all together. (Jt. A. 76-80). By letter dated October 31, 1994, Petitioner was advised that the SCS classification for "converted wetlands" was erroneous; the correct number being 28.2 acres. Also by date of October 31, 1994, Gunn was sent a corrected Wetland Conservation Determination confirming the final classification to be 28.2 acres of "converted wetland" due to the Drainage District activities. (App. pp. 23-24 and 40). The classification of 28.2 acres as "converted wetland" precluded Petitioner from farming it in 1995 (and each year thereafter until the Court rules) costing him an estimated $2,820.00 per year. (App. p. 35).

C. Proceedings In The District Court.

Petitioner asked the District Court to enter a declaratory judgment ruling that Gunn was entitled to crop his farm land as either ordinary farm land or as a "prior converted" wetland. Even though asked to, the District Court did not address the Congressional exemption from "swampbuster" for "converted wetland." The District Court found the USDA's enforcement of the Food Security Act of 1985 reasonable. (App. pp. 26-27).

D. Proceedings In The Court Of Appeals.

Petitioner appealed the District Court's failure to find USDA's determination contrary to Congressional intent. The Eighth Circuit affirmed. (App. pp. 11-14). In doing so, the Eighth Circuit sided with the USDA's interpretation of the statute without first ascertaining Congress' intent as required by this Court in Chevron USA, Inc. v. Natural Resources Council, Inc., 467 U.S. 837 (1984).

REASON FOR GRANTING THE WRIT

THIS CASE PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT. DID THE COURT OF APPEALS REQUIRE THE RESPONDENT TO FOLLOW THE CLEAR CONGRESSIONAL INTENT IN APPLYING THE CONGRESSIONAL EXEMPTION FOR "CONVERTED WETLAND" FROM "SWAMPBUSTER".

When agency action violates Congressional intent, the agency's actions are not entitled to deference. Chemical Manufacturers Ass'n v. Natural Resources Defense Council, Inc., 470 U.S. 116, 125, 105 S.Ct. 1102, 1107-08, 84 L.Ed.2d 90 (1985). If agency action violates Congressional intent, the reviewing Court must reject administrative constructions which are contrary to the clear Congressional intent. Chevron E.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-45, 104 S.Ct. 2778, 2781-83, 81 L.Ed.2d 694 (1984). Accordingly, this

Court must review the USDA's conduct in light of the language and legislative history of the 1985 Farm Bill, as amended.

Due to the Drainage District's replacement of the 28-inch tile main with an open ditch, Petitioner was advised that if he produced an agricultural commodity on the "converted wetland" acres, he would lose his eligibility to participate in government farm programs. Petitioner, believes because of the 1906 tiling that his affected acres are "prior converted" wetlands exempt from "swampbuster".

As the USDA sees it, even though the 28.2 acres were no longer wetland and had been farmed since 1906, the drainage could only be maintained, not improved. The question then becomes one of whether or not Congress intended to exempt from "swampbuster" land which was no longer wetland because it had been converted to agricultural use. A review of the statute and its legislative history answers the question with a clear "yes".

When Congress enacted the Food Security Act of 1985, it exempted from "swampbuster" the conversion of wetland to agricultural use commenced before December 23, 1985. Food Security Act of 1985, 99 Stat. 1508; 16 U.S.C. Section 3822(b)(1)(A). Congress hasn't changed this exemption since its enactment. Simply stated, the exemption provides that a farmer is not ineligible from participating in government farm programs

if he produces agricultural commodities on converted wetland if the conversion of the wetland was commenced before December 23, 1985.

When interpreting a statute construed by an administrative agency, the first task is to consider "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; . . .[but] if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43, 104 S.Ct. 2778, 2781-82, 81 L.Ed.2d 694 (1984). As such, the first thing to do is to turn to the language of "swampbuster" itself. Mead Corp. v. Tilley, 490 U.S. 714, 722, 109 S.Ct. 2156, 2162, 104 L.Ed.2d 796 (1989); Mallard v. U.S. Dist. Court For Southern Dist. of Iowa, 490 U.S. 296, 109 S.Ct. 1814, 1818, 104 L.Ed.2d 318 (1989).

The District Court found Congress' intent to be silent or ambiguous and held the USDA's construction of the "commenced" exemption reasonable. Congress was not silent. Congress was not ambiguous. Congress spoke directly to when the converted wetland exemption commences. The operative terms are "converted wetland" and "commenced". Congress defined "converted wetland". Food Security Act of 1985, 99 Stat. 1504; 16 U.S.C. Section 3801(a)(4)(A).

Congress hasn't changed this definition since its enactment. Simply stated, and as applied to Gunn's situation), Gunn's wetland became "converted wetland" when the draining of the wetland made the production of an agricultural commodity possible. Congress did not define the word "possible". However, the fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as having their ordinary, contemporary, common meaning. Asgrow Seed Co. v. Winterboer, ___ U.S. ___, 115 S.Ct. 788, 793, 130 L.Ed.2d 682 (Iowa 1995). The word "possible" ordinarily means capable of being, becoming, or coming to pass; not contrary to the nature of things; neither necessitated nor precluded; free to happen or not. Blacks Law Dictionary, p. 1166 (6th Ed. 1990)[23]. In Petitioner's case the word only requires that the drainage (tiling) on his farm be sufficient for the purpose or effect of making agricultural products grow. As such, once the drainage tile on that portion of Petitioner's 160 acres was buried, thereby making the production of agricultural commodities possible, the

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[23] Indeed, some dictionaries give as one meaning of "possible" simply "capable of happening". See, e.g., the Random House Dictionary Of The English Language, p. 1123 (The unabridged Ed. 1971). See also Webster's Third New International Dictionary of the English Language, Unabridged, p. 1771 (1993); 33 Words and Phrases, "Possible".

land, for purposes of "swampbuster," became converted wetland. This is the plain meaning of Congress' definition. The statutes plain meaning must be enforced. U.S. Nat. Bank of Or. v. Independent Ins. Agents, 508 U.S. 439, 113 S.Ct. 2173, 2182, 124 L.Ed.2d 402 (1993). In this regard, not only did the drainage tiling make the production of agricultural commodities possible, the production of agricultural commodities has been the case since 1906.

When we compare the USDA's regulations regarding "converted wetland" with the statute, we see that the regulations do not comply with the intent of Congress. While, the regulations define "converted wetland" the same as Congress (7 C.F.R. Section 12.2(a)(6)) a later regulation setting out the identification criteria for converted wetland, does away with the intent of Congress. The later regulation states that wetland will not be considered converted if "it is determined that the actions of the persons producing such agricultural commodity does not permanently alter or destroy natural wetland characteristics. Compare 7 C.F.R. Section 122(a)(b) with 7 C.F.R. Section 12.32(a) and (b)(2). Contrary to Congress' intent of "possible", the USDA regulations deny "converted wetlands" status unless (in Petitioner's case) the draining permanently altered or destroyed the natural wetland characteristics. Congress didn't make that the criteria. If Congress had wanted to make that the criteria, they could have. Not having

done so, the regulations are contrary to the clear intent of Congress.

Lending assistance to Petitioner's view is the legislative history. In the process of enacting the 1985 Farm Bill, both the House and the Senate passed separate versions of the legislation which were sent to Conference Committee. In dealing with the two different versions, the Conference Committee Report noted:

> "(7) Exemption from wetland (sec. 1222)
>
> (a) The House bill exempts converted wetland from the program ineligibility provision of Section 1202 [16 U.S.C. Section 3821] <u>if the land became converted wetland before the date of enactment</u> of the bill (Sec. 1203(a)(6)."

The Senate amendment exempts converted wetland <u>if the conversion of the wetland was commenced before the date of enactment</u> of the bill. (Sec. 1622(a)(1).

The Conference substitute adopts the Senate amendment. <u>The conferees intend that conversion of wetland is considered to be "commenced - when a person has obligated funds or begun actual</u>

modification of the wetland." [24] (Underlining supplied by the undersigned.)

The Conference Committee clearly chose to exempt from wetland regulation conversions that commenced before December 23, 1985. Pivotal to Congress' intent is their requirement that the activity causing the conversion of a wetland begin prior to December 23, 1985. Congress was not concerned with how successful the conversion was, only that the conversion have the effect or be for the purpose making the production of an agricultural commodity possible. A Conference Committee Report is very persuasive evidence of Congressional intent (besides the statute itself). Even though the Conference Committee could have adopted a modified version of the House and Senate versions (as the USDA Regulations do) because it didn't, it is clear Congress ruled out the limitation of "or completed" altogether. More importantly, by doing so, Congress' clear intent was to exempt any conversion so long as it was commenced before December 23, 1985, regardless of when it was completed. The very facts of this case, underscore Congress' wisdom. Like buildings built years ago, in order to

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[24] U.S.C. Congressional and Administrative News, 99th Congress - - First Session, 1985, Volume 3, Page 2386. The House and Senate agreed to the Conference Committee Report on December 18, 1985. Id., Vol. 1, 99 Stat. 1660.

meet present needs, they must be improved as well as maintained. But if a building is only maintained, that doesn't mean the building returns to vacant ground. Similarly, roads laid in the day of the Model "A", must be improved, as well as maintained, to meet the needs of modern transportation. However, only maintaining a road doesn't mean the road reverts to being open prairie. When something is changed from its natural state, it doesn't revert back to its natural state with only maintenance of the changes. Conversely, improving the changes doesn't convert the property; the conversion was occasioned upon the first initiated change. So, what were acceptable drainage practices in the early 1900's is not, now, and an open ditch, rather than a buried tile, better meet the needs of today's farming. However, the conversion to cropland took place with the initial tiling. In implementing "swampbuster", Congress' intent was to bring to a stop the conversion of wetland into cropland. As the facts of this case show, Gunn's wetland had already been converted to cropland before "swampbuster". The Drainage District replacement of the tile with an open ditch did not change that. To hold otherwise means that, eventually, all Drainage Districts will cease. If a farmer cannot continue to use his farmland once converted to the production of agricultural commodities, eventually it will be too costly to just continue the maintenance of the drainage tile. The return from only maintaining the drainage tile will not produce a profit

and the USDA's interpretation will force abandonment of a substantial amount of prime farmland in the United States.

Statements made by key legislators during the debate on the Food Security Act of 1985 lend further support to Gunn's interpretation of the plain meaning of 16 U.S.C. Section 3822(b)(1)(A):

> "On Wednesday, July 31, 1985, the Committee returned to the Conservation Title. Mr. Daschle was recognized to offer a clarifying amendment to the previous adopted swamp-buster provisions. Mr. Daschle briefly explained the provisions of the amendment. Mr. Lewis offered an amendment to the amendment to clarify that the definition of wetlands would not simply include wet soils. Mr. Daschle said he would accept the amendment. The Committee agreed to the Lewis amendment by voice vote. Mr. Daschle and Mrs. Lewis discussed the question of cropland that has been flooded and later reclaimed. Mr. Daschle stressed that the amendment would not affect the use of this land because if production was underway at any time in the past, the land would be grandfathered.

(emphasis added)."[25]

Mr. Daschle's use of the term "grandfathered" is not unusual for lawmakers. In the area of legislation, the term has come to have an ordinary and well understood meaning. To be "grandfathered" means there is a provision in a statute which is "an exception to a restriction that allows all those already doing something to continue doing it even if they would be stopped by the new restriction." Blacks Law Dictionary, 699 (6th Ed. 1990). Mr. Daschle's comment is of significant importance, because it refutes the position of the USDA. The USDA takes the position that if the tiling is not sufficient to drain the ground so that no flooding occurs, then you can't improve the draining to do away with it. In response, Mr. Daschle notes that even if land was flooded and later been reclaimed, the "swampbuster" provisions would not affect the use of the land because "if production was underway at any time in the past", the land would be exempted from "swampbuster".

As additional evidence of Congress' intent, we have the following explanation of the purpose of "swampbuster".

> "Wetland Conservation. <u>The purpose of the wetland conservation subtitle of the</u>

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[25] Report of House Committee on Agriculture, Page 419, July 31, 1985.

> Committee is to discourage the draining and cultivation of wetland that is unsuitable for agricultural production in its natural state. This purpose will be realized by limiting an agricultural producer's access to various price support, production adjustment, Federal Crop insurance, Federal crop insurance, Federal disaster loans and payments, and various other programs carried out by the Federal Government if the producer drains and plants crops on natural wetland. (Underlining supplied by the undersigned)."[26]

Because the purpose of Congress was to discourage converting land so as to begin agricultural production, it is obvious that Gunn's land that has been drained and continuously cropped for 87 years was intended to be exempt from "swampbuster".

CONCLUSION

For all the reasons noted above, Petitioner respectfully requests the Court grant his Petition for Writ of Certiorari and reverse the decision of the Eighth Circuit.

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[26] Id. at September 30, 1985.

Respectfully submitted,

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BEST AVAILABLE COPY

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 96-3995

CHARLES GUNN,

Appellant,

vs.

UNITED STATES DEPARTMENT OF AGRICULTURE AND NATURAL RESOURCES CONSERVATION SERVICES,

Appellees.

ORDER DENYING PETITION FOR REHEARING EN BANC

Filed: September 8, 1997

The suggestion for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Order entered at the direction of the Court:

Attest: Michael E. Ganns

Clerk, United States Court of Appeals, Eighth Circuit.

App. 2

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 96-3995SI

Charles Gunn,	)	
	)	
Appellant,	)	
	)	On Appeal From
vs.	)	the United
	)	States
United States Department	)	District Court
of Agriculture and	)	for the
Natural Resources Conser-	)	Southern
vation Service,	)	District of
	)	Iowa
Appellees.	)	

Submitted: May 19, 1997

Filed: July 7, 1997

Before RICHARD S. ARNOLD, Chief Judge, BOWNMAN and MORRIS SHEPPARD ARNOLD, Circuit Judges.

RICHARD S. ARNOLD, Chief Judge.

Charles Gunn filed this action in the District Court[1] to challenge the Soil

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[1] The Hon. Charles R. Wolle, Chief Judge, United States District Court for the Southern District of Iowa.

Conservation Service's (SCS[2]) determination that certain parts of his farmland were converted wetlands and could therefore not be farmed without his losing eligibility for certain farm benefit programs. The District Court held that the SCS's regulations are a reasonable interpretation of the pertinent statute, 16 U.S.C. Sections 3801, 3821-24, and that the SCS's determination that the lands were wetlands was supported by substantial evidence. The Court dismissed Gunn's taking-by-inverse-condemnation claim for lack of jurisdiction. We affirm.

I.

Gunn owns 160 acres of land in Iowa that he and his predecessors-in-interest have farmed since 1906. Before that time the acreage was wetlands and not arable. In 1906 the local drainage district installed tiles under the land to drain the excess water from the land. Other tiling allowed water from neighboring farmland to drain across Gunn's land. By 1947, additions to the drainage system

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[2] The SCS, an agency within the Department of Agriculture, was abolished in 1994, and its functions were transferred to the Natural Resources Conservation Service. See Pub. L. No. 103-354, Sect. 246, 108 Stat. 3178, 3223-25 (1994)(codified at 7 U.S.C. Sect. 6962). For ease of reference, we use the term SCS throughout the opinion.

had increased the drained area so that the amount of water in some years exceeded the capacity of the system, leaving parts of Gunn's land wet and unsuitable for farming. Realizing that a drainage problem existed, the drainage district in 1992 installed new drainage tiles and dug an open ditch on Gunn's land that remedied the system's shortcomings.

In order to combat the disappearance of wetlands through their conversion into crop lands, Congress passed a law known commonly as "Swampbuster." Food Security Act of 1985, Pub. L. no. 99-198, Sections 1201, 1221-23, 99 Stat. 1354, 1504-08 (codified as amended at 16 u.S.C. Sections 3801, 3821-24). This law did not make illegal the conversion of wetlands to agricultural use, but did provide that any agricultural production on a converted wetland would cause the farmer to forfeit his eligibility for a number of federal farm-assistance programs. Among the exemptions to the provisions of Swampbuster is one for wetlands that had been converted to agricultural production before December 23, 1985. See Section 3821(d). The farming of such previously converted wetlands does not make the farmer ineligible for benefits.

In order for a farmer to participate in the benefits programs, he must certify his eligibility to the SCS. The SCS determines whether the land for which a farmer seeks benefits contains wetlands that have been converted for agricultural

purposes. Charles Gunn sought certification in 1991, and was told by the SCS that his farm contained 32.9 acres of "farmed wetlands," which are, in essence, wetlands that are sometimes dry enough to farm. The SCS advised Gunn that he could continue to farm these lands as well as maintain the existing drainage system, but if he wished to remain eligible for benefits he could not improve the land's drainage. This ruling was upheld after an appeal within the agency. Gunn did not seek further review.

In 1992, the local drainage district improved the drainage system, as noted above. In the process of analyzing the new system, SCS discovered that the previous drainage system had had a greater capacity than previously realized, but still had been insufficient to drain the land completely. It also determined that because the new system completely drained the land, part of Gunn's land now constituted converted wetlands. After a series of appeals within the agency, the SCS concluded that 28.2 acres of Gunn's land were wetlands that had been converted by the drainage district's recent activities and could not be farmed by Gunn without his losing eligibility for farm benefit programs.

Gunn then filed this action in the District Court, seeking a declaratory judgment that he was entitled to farm this land without losing benefits, and damages for his not having farmed the lands during the decision and appeal

process. In the alternative, if the converted wetlands determination was upheld, he sought compensation for a taking of land by inverse condemnation. The District Court held that the classification of the lands as converted wetlands was reasonable, denied Gunn's desired declaration, and refused to award damages. it also dismissed the takings claim for lack of jurisdiction because Gunn sought compensation in an amount greater than $10,000, a claim over which the Court of Federal Claims has exclusive jurisdiction. See 28 U.S.C. Sections 1346, 1491. The District Court also stated that the government's action was not a taking. Gunn then took this appeal.

II.

Gunn challenges the SCS's decision in two ways. First, he contends that the pertinent regulations are neither consistent with, nor a reasonable interpretation of, the Swampbuster statute. Second, he argues that the SCS failed to follow its own regulations in deciding his eligibility. We hold that the regulations are consistent with the statute and that the SCS followed those regulations in its decision-making process.

A.

The statute makes ineligible for benefits, listed at 16 U.S.C. Section 3821(b), any person who "converts a wetland by draining, dredging, filling,

leveling, or any other means for the purpose, or to have the effect, of making the production of an agricultural commodity possible on such converted wetland . . . for that crop year and all subsequent crop years." Section 3821(c). it also makes ineligible for these same benefits, such as crop insurance, price supports, and government-sponsored loans, any person who "produces an agricultural commodity on converted wetland." Section 3821(a). The act defines a converted wetland as a "wetland that has been drained, dredged, filled, leveled or otherwise manipulated" so that agricultural production is made possible. Section 3801(a)(6)(A). The statute provides one exception relevant to this case; no person becomes ineligible for agricultural production on converted wetlands "if the conversion of the wetland was commenced before December 23, 1985." Section 3822(b)(1)(A).

The SCS has promulgated regulations to refine the scope of these provisions. Gunn contends the regulations are contrary to the plain language of the statute, and, if the statute is ambiguous, that the regulations are not a reasonable interpretation under the rule of Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). Therefore, he argues, the decision by the SCS is invalid. We disagree, and conclude that the regulations carefully follow the statutory language and are reasonable interpretations of any statutory ambiguities.

The first aspect of the regulations that Gunn challenges is their definition of a converted wetland. He contends that the definitions at 7 C.F.R. Section 12.2(a)(6) & 12.32 (1992) are contrary to the statute. Section 12.2(a)(6) defines converted wetlands in terms virtually identical to those used in the statute.[3]

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[3] 16 U.S.C. Section 3801(a)(6)(A) provides that:

The term "converted wetland" means wetland that has been drained, dredged, filled, leveled, or otherwise manipulated (including any activity that results in impairing or reducing the flow, circulation, or reach of water) for the purpose or to have the effect of making the production of an agricultural commodity possible if

(i) such production would not have been possible but for such action; and

(ii) before such action --

(I) such land was wetland, and

(II) such land was neither highly erodible land nor highly erodible cropland."

In comparison, 7 C.F.R. Section 12.2(a)(6)(A) provides that:

Converted wetland means wetland that

Section 12.32(a) lists factors that are to be considered in determining whether a wetland has been converted, such as whether woody hydrophytic vegetation has been removed. Finally, Section 12.32(b), which accords with the exception provided by 16 U.S.C. Section 3801(a)(6)(B), explains that a wetland shall not be

---

> has been drained, dredged, filled, leveled, or otherwise manipulated (including any activity that results in impairing or reducing the flow, circulation, or reach of water) that makes possible the production of an agricultural commodity without further application of the manipulations described herein if (i) such production would not have been possible but for such action; and (ii), before such action such land was wetland and was neither highly erodible land nor highly erodible cropland.

Gunn points to the phrase "without further application of the manipulations described herein," which is in the regulation but not in the statute. We do not see what of substance this phrase adds or changes. Under the statute, conversion occurs when wetland is "manipulated" with a certain effect. The regulation simply underscores that it is the initial manipulation, not some subsequent "applications" of it, that is to be considered for this purpose. This is a reasonable interpretation of the statute.

considered converted just because natural conditions, such as drought, allow a farmer to cultivate certain land, so long as that farming does not "permanently alter or destroy natural wetland characteristics" -- the farmed-wetlands exception. We perceive no inconsistency between the regulations and the statute they are intended to effectuate. Rather, they provide scientifically defined bases for determining whether the provisions of the statute have been violated. Such expert refinements are well withing the purview of the SCS, and do not make its determination in Gunn's case invalid.

Next, Gunn challenges the regulations' definition of "commenced." The statute allows the farming of wetlands the conversion of which was commenced before December 23, 1985, without the farmer's losing benefits. The regulations allow a farmer to demonstrate that he has commenced the conversion in one of two ways: by showing he has actually dredged, drained, filled, leveled, or otherwise manipulated the wetlands before the given date, 7 C.F.R. Section 12.2(a)(6) & 12.5(b)(3)(i), or that he has contractually committed substantial funds to someone else who will perform these activities, Section 12.5(b)(3)(ii). Gunn reads the substantial-funds requirement to have impermissibly narrowed the statutory term "commenced" from what Congress intended. Von Eye v. United States, 92 F.3d 681, 685 (8th Cir. 1996), which considered the application of the requirement, suggests it did not. Moreover, the substantial-

funds provision allows a farmer to come within the exception not only by actually starting the land-moving activities, as the statutory term "commenced" naturally suggests, but also by simply comitting to have such activities undertaken in the future. Gunn has not shown that the 1992 conversion was commenced under either the statutory definition or the definition in the regulations. Any discrepancy between the two, therefore, does not change the conclusion that his wetlands do not come within the exception for previously converted wetlands.

Alternatively, Gunn could succeed on his claim if he had actively pursued this particular conversion since before December 23, 1985. Downer v. United States, 97 F.3d 999, 1004 (8th Cir. 1996). The initial improvement took place in 1906, and the SCS told Gunn he could maintain that drainage system without losing benefits. (This accords with Von Eye, 92 F.3d at 685, which allows post-1985 conversions only to the extent of plans already in place in 1985.) In 1992 another conversion took place. Gunn has not demonstrated that the two constructions, over 80 years apart, were actually one actively pursued conversion. To the contrary, the 1906 work achieved what was intended, even though it later proved inadequate.

Gunn also argues--and this may be his principal point--that he is entitled to an exemption under the plain words of the statute. Section 3822(b)(1)(A) of Title 16 provides, in relevant part, that

"[n]o person shall become ineligible . . . for program loans or payments . . . [a]s the result of the production of an agricultural commodity on . . . [a] converted wetland if the conversion of the wetland was commenced before December 23, 1985." Gunn claims that his land fits this definition, because, in his view, it became a converted wetland in 1906, at the time of the initial improvements. He points to the definition of the term "converted wetland" in 16 U.S.C. Section 3801(a)(6)A). This provisions reads, in pertinent part, as follows: "'converted wetland' means wetland that has been drained . . . or otherwise manipulated . . . for the purpose or to have the effect of making the production of an agricultural commodity possible if . . . before such action . . . such land was wetland . . ." In 1906, Gunn says, his land was drained or otherwise manipulated both for the purpose and with the effect of making the production of agricultural commodities possible. This production, in fact, has continued ever since. Accordingly, the land became "converted wetland" before December 23, 1985, and remains in that classification forever, whatever may have happened later.

We agree with Gunn that the words of the statute, considered in isolation, can bear the meaning for which he contends. The agency's interpretation, however, is different, and we believe that the interpretation is sufficiently plausible to meet the Chevron test. The agency stresses the requirement that "converted

wetland" is land that before drainage "was wetland." On this view, land is either wetland or converted wetland. If significant wetland characteristics remain, the land remains wetland and cannot be converted wetland. If the drainage or other manipulation has been sufficient to make crops producible, as is the case here, the land is best described as "farmed wetland," a term that does not appear in the statute but that the agency's regulations have adopted. "Farmed wetland" can continue to be farmed without the loss of benefits, but only so long as the previously accomplished drainage or manipulation is not significantly improved upon, so that wetland characteristics are further degraded in a significant way. In the present case, of course, the 1992 improvements have done exactly that. They were designed to and have in fact further degraded the wetland characteristics of the farm. It follows that part of the farm is "converted wetland," but that it did not become converted wetland until 1992.

This interpretation also accords with the general purpose of the statute--to preserve those wetland characteristics still in existence in 1985. Gunn's view, by contrast, would run counter to this purpose, at least to a significant extent. Under his approach, if any drainage has taken place before December 23, 1985, making it possible to produce agricultural commodities to any significant extent, the property becomes exempt altogether, no matter what further

improvements might occur. As Gunn recognizes, under this approach, "it does not matter if the production [made possible by the earlier drainage] is merely 20% possible or 99% possible." Reply Brief for Appellant 12. The land, once any improvement whatever has occurred before 1985, becomes permanently exempt from the statute. We do not think that this interpretation furthers Congress's general purpose, nor do we think that it is the only one possible under the statutory language. We therefore defer to the interpretation of the Department of Agriculture. Gunn does not contest the fact that the land continued to have significant wetland characteristics before the 1992 work. Part of the purpose of Congress was to preserve these characteristics.

Next, Gun argues that the conversion comes within the outside-agent exception to the anti-conversion rules. The regulations establish a presumption that conversions undertaken by a drainage district, in whose jurisdiction a farmer resides and which has assessed the farmer for part of the costs of the activity, are attributed to the farmer, unless he can show that the conversion was caused by an unassociated third person and that he is not using the land for agricultural production. See 7 C.F.R. Section 12.5(b)(1)(iv)(D). Gunn contends that the drainage district's ditch-digging should not, as a matter of law, be attributed to him, and therefore that his land should not be deemed converted. But Gunn has not met the burden placed upon

him by the regulations, and nothing in the statute exempts a farmer from the provisions of the Act eimply because that land is converted by a drainage district.[4] We have found no evidence in the record to support Gunn's argument that attribution to him of the district's activities was erroneous. In fact, Gunn joined with other landowners in the petition to have the improvements made. J. App. 108. Therefore, he can be held

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[4] Gunn contends that the regulations are inconsistent with a subsequently enacted (1990) provision, 16 U.S.C. Section 3824, which provides that croplands that have been turned into wetland by "the actions of an unrelated person or public entity, outside the control of, and without the prior approval of, the landowner . . . shall not be considered to be wetland." That provision does not apply to Gunn's situation. Section 3824 allows a farmer whose cropland is turned into wetland to return that land to cropland without converting it within the meaning of the statute. We do not see how this statute is applicable to the case at hand, as Gunn does not contend that his land was turned into wetland by the drainage district. He contends the opposite: that his wetlands were turned into cropland. In addition, the drainage district is not "unrelated" to Gunn. His land is included within it, and he was one of the landowners who applied for the 1992 ditching.

responsible for the conversion of wetlands that the improved drainage was found to have caused, and he is not entitled to the exemption in the regulation.[5]

B.

Gunn also argues that the SCS failed to follow its own regulations in determining that the acreage in question was "wetland." He cites 7 C.F.R. Section 12.33(b). The portion of the regulation on which Gunn relies reads as follows:

> Maintenance or improvement of . . . converted wetlands for the production of agricultural commodities are not subject to this rule so long as such actions do not bring additional wetland into the production of an agricultural commodity. Additional wetland means any natural wetland or any converted wetland that has reverted to wetland as the result of abandonment of crop production.

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[5] We have received a brief amicus curiae from the Iowa Drainage District Association in support of Gunn's position. We have considered it to the extent it supports arguments advanced by Gunn on appeal. We have no reason to consider the artuments it advances that were not raised by Gunn himself. Knetsch v. United States, 364 U.S. 361, 370 (1960).

We do not believe that the quoted language helps Gunn's case. His property, for reasons we have given earlier in this opinion, never became "converted wetland," because it retained continuously from 1906 until at least 1992 wetland characteristics. The property was thus properly classified as "farmed wetland," rather than "prior converted wetland." The quoted portion of the regulation comes into play only if "converted wetlands" are involved.

We add that the concluding sentence of the regulation appears to lend further support to the SCS position in this case. This sentence reads as follows, in pertinent part:

> Furthermore, the maintenance of any alteration or manipulation that affects the reach or flow of water made to a wetland that was cropped before December 23, 1985, would not cause a person to be determined to be ineligible under this part, provided that the maintenance does not exceed the scope and effect of the original alteration or manipulation, as determined by SCS . . ..

We think this language fits Gunn's situation. His property is wetland that was cropped before December 23, 1985. The work undertaken in 1992 definitely did exceed the scope and effect of the original manipulation. Accordingly, SCS acted consistently with its own regulations in determining that the 28.2

acres in question were wetlands, on which Gunn could not farm by mechanical means without losing his eligibility for federal farm benefits.

III.

Both parties now agree that the District Court was without jurisdiction to entertain Gunn's claim for just compensation under the Fifth Amendment, because Gunn requested damages in excess of $10,000.00. See 28 U.S.C. Sections 1491 & 1346(a)(2), the Little Tucker Act. Gunn argues on appeal, however, that the District Court should have transferred this claim to the United States Court of Federal Claims. Such a transfer is authorized by 28 U.S.C. Section 1631 if the interests of justice warrant it and the court to which the case istransferred would have jurisdiction. Another statute, 28 U.S.C. Section 1500, provides that the Court of Federal Claims has no jurisdiction over a claim for which, or in respect of which, a case pending in another court. The Federal Circuit has interpreted this provision to bar the Court of Federal Claims' jurisdiction over a claim only when another claijm based on the same operative facts and seeking the same type of relief is pending in a different court. See Loveladies Harbor, Inc. v. United States, 27 F.3d 1545, 1551 (Fed. Cir. 1994)(en banc). The two claims in Loveladies were a challenge to the government's denial of a wetlands-use permit under the Administrative Procedure Act and a takings claim based on that denial. The

court held the two claims sought different types of relief. Id. at 1551-52. Gunn's two claims are similar. We think the Court of Federal Claims would have jurisdiction over the takings claim if it were transferred.

Gunn also must show that the interests of justice require transfer of his claim, a decision that lies within the discretion of the trial court. Section 1631 was enacted so that parties confused about which court has subject-matter jurisdiction would not lose an opportunity to present the merits of a claim by filing in the wrong court and the statute of limitations would have run before he could refile properly. See In re Apex Oil Co., 884 F.2d 343, 346 (8th Cir. 1989); Hempstead County & Nevada County Project v. United States E.P.A., 700 F.2d 459, 463 (8th Cir. 1983). Gunn has not shown that either of those circumstances exists here. So far as we can tell from the record now before us, Gunn is free at any time to file his takings claim in a separate action before the Court of Federal Claims.

An additional word should be added to clarify the situation in the event of further proceedings on count II in the Court of Federal Claims. The District Court's opinion, slip op. 7, states that "Gunn has not shown that he is entitled to compensation under an inverse condemnation theory." This statement appears in the opinion after the Court had already held that it lacked jurisdiction of count II, which is the

count containing the inverse-condemnation theory. We take this statement to be dictum. The District Court had no jurisdiction to pass on the merits of the inverse-condemnation theory, and if this theory, either in a separate action or otherwise, should later be asserted before the Court of Federal Claims, we do not believe the District Court's statement should be taken to preclude whatever rights Gunn may have. In that event, in other words, it would be up to the Court of Federal Claims to decide themerits of Gunn's inverse-condemnation theory.

On this understanding, the judgment of the District Court is

Affirmed.

A true copy.

Attest:
CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

CHARLES GUNN,	)	No. 4-95-CV-80373
Plaintiff,	)	
vs.	)	
UNITED STATES DEPARTMENT OF AGRICULTURE, NATURAL RESOURCES CONSERVATION SERVICE,	)	
Defendants.	)	ORDER

In this action, plaintiff, Charles Gunn seeks judicial review of the United States Department of Agriculture, Natural Resources Conservation Service ("USDA") classification of a portion of his Greene County farm as a converted wetland. This court has jurisdiction to review agency action under the Administrative Procedure Act. 5 U.S.C. Section 702.

On March 12, 1996, the court held a hearing on the issues framed by the pleadings, the briefs, and the partis' proposed final decisions. The court commends counsel for their thorough presentation of the parties' positions. I regret I have been unable until now to review completely the large administrative record and to study

carefully the cited legal authorities.

The court concludes that the plaintiff is not entitled to the relief he seeks. The plaintiff's complaint is dismissed with prejudice, with costs taxed to the plaintiff.

In 1985, Congress enacted a statutory scheme, commonly known as Swampbuster, to protect and preserve America's wetlands. 16 U.S.C. Sections 3821-3824. Under Swampbuster, farmers who produce agricultural commodities on land delineated as wetlands by the Secretary of Agriculture are ineligible for certain farm programs. An important exception to this rule, however, allows a farmer to convert and utilize wetlands for agricultural production without losing farm program eligibility if the farmer commenced the conversion before December 23, 1985. This exception is at issue in this case.

Gunn is a farmer in Greene County, Iowa. In 1906, the Greene County Drainage District No. 5 ("the District") installed a 28-inch diameter tile main through the land in dispute in order to utilize it for crop production. Gunn and his predecessors farmed the land or placed it in set aside programs in the subsequent years. Despite the drainage, the nature of the land prevented Gunn from farming it in wet years. In 1991, the USDA classified a portion of Gunn's

land as a farmed wetland[1] Gunn appealed this classification to the District Conservationist and the Area Conservationist, but each upheld the original determination. Gunn did not appeal further to the State Conservationist.

In 1992, the District replaced the old 28-inch diameter tile main with an open ditch. In a subsequent analysis of the Gunn property, the USDA reclassified portions of the property as a converted wetland. The engineer who performed the analysis considered the drainage

---

[1] A "converted wetland" is a "wetland that has been drained, dredged, filled, leveled or otherwise manipulated . . . for thepurpose or to have the effect of making the production of an agricultural commodity possible . . ." 16 U.S.C. Section 3801(a)(4)(A). A converted wetland may not be farmed without losing certain farm subsidies.

A "farmed wetland" is land that, while farmed, continues to exhibit wetland characteristics. This land may only be farmed as it existed prior to December 23, 1985; no new drainage may be constructed on it.

In contract, a "prior converted wetland" has been so completely converted to crop land that it is not subject to regulation; in essence, it is exempt from the Swampbuster provisioins and may be farmed as if it were not a wetland.

activities of the District and concluded that the tile main did not provide sufficient additional drainage to warrant classifying it as a prior converted wetland. In total, the USDA has classified 4.5 acres of Gunn's farm as farmed wetlands and 28.2 acres as converted wetlands. The practical effect of the USDA classification is that Gunn would be ineligible for several federal farm programs if he plants crops on the affected areas or harvests pasture or hay from the land by mechanical means. Gunn appealed this determination to the Chief of the Soil Conservation Service in Washington D.C., the final level of administrative appeal. In 1994, the Chief affirmed the prior classification. Gunn then filed this federal lawsuit.

I. Supplementation of Agency Record. To aid the court's review of the agency action, the plaintiff moves to supplement the agency record with USDA Manuals and an affidavit by Charles Gunn. A court should limit its review of agency action to the administrative record unless the moving party can show that the record does not provide an adequate basis for judicial review. Independent Meat Packer's Ass'n v. Buntz, 526 F.2d 228, 239 (8th Cir. 1975). Here, Gunn's affidavit quantifies his losses due to the USDA determination that portions of his land are converted wetlands. The USDA manuals articulate the criteria that the agency uses in making wetland determinations. These documents have been received in evidence and carefully reviewed. They are not entitled to great

weight, however, because they are not materially in conflict with the stipulated facts and the materials in the administrative record on which the USDA relied in reaching its final decision.

The plaintiff's motion to supplement the agency record is granted, and the USDA's motion to strike is denied.

II. USDA Construction of the Swampbuster Act. Gunn primarily alleges that the USDA did not follow congressional intent in construing the Swampbuster Act. In particular, Gunn disputes the USDA's construction of the word "commenced" in the provision exempting converted wetland when conversion is commenced before December 23, 1985. 7 C.F.R. Section 12.5(b)(5) (construing 16 U.S.C. Section 3822(b)(1)(A)). The USDA regulations require that a person have started conversion of a wetland or obligated funds for conversion before December 23, 1985, in order for the lands to be exempt from Swampbuster. Id. Under the USDA interpretation, a person who begins conversion of wetland will be allowed to complete it. In contrast, Gunn argues that any conversion activity that is commenced before the deadline date prospectively exempts the affected lands from the Act.

In the face of Congressional silence or ambiguity, courts will defer to an administrative agency's reasonable construction of a statute. Chevron U.S.A. v. Natural Resources Defense

Council, 467 U.S. 837, 843-44 (1984). in the Swampbuster Act, Congress has not clearly defined when conversion activity has commenced. Under these circumstances, the USDA has reasonably construed the statutory uncertainty to achieve the goals of wetland conservation without imposing undue economic hardship on individuals who have actually commenced conversion before December 23, 1985, and actively pursued it. Therefore, the court upholds the agency's construction of the Swampbuster Act.

III. Is Gunn's Land a Converted Wetland? Gunn secondarily contends that, even if the USDA construction of the statute is reasonable, the USDA acted arbitrarily and capriciously in determining that his farmland is a converted wetland. A court will uphold an administrative agency decision unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. Section 706(2)(a). If the agency has properly considered the relevant evidence and arrived at a rational conclusion, the court will defer to agency expertise. See Citizens to Protect Overton Park v. Volpe, 401 U.S. 402, 416 (1974); Nat'l Wildlife Fed'n v. Whistler, 27 F.3d 1341, 1344 (8th Cir. 1994).

The USDA did not act arbitrarily in rejecting Gunn's claim that current drainage activities are merely a continuation of a conversion commenced in 1906 by the District. The conversion from wetland to farmland of the lands in

question did not begin before 1985. Further, the conversion was not directly linked to previous plans and activities aimed at draining the land. Earlier projects were separate and distinct in scope and effect from the 1992 effort to use a new main ditch to drain the land. Evidence in the administrative record supports the findings of fact on which the agency based its final decision. As in Von Eye v. United States, No. 95-3034, 1996 WL 447739 (8th Cir. Aug. 9, 1996), the USDA considered relevant evidence, properly construed the governing statutes, 16 U.S.C. Section 3822(b), and regulations, 7 C.F.R. Section 12.5(b), and arrived at a rational result.

The court upholds the USDA determination that Gunn's lands in question are converted wetlands.

IV. Jurisdiction of the District Court. Gunn argues in the alternative that the federal government has taken his property without just compensation. Before the court will consider this claim, it must have jurisdiction to do so. Under the Tucker Act, the United States Claims Court has exclusive jurisdiction over monetary claims against the federal government that exceed $10,000.00 in value. 28 U.S.C. Sections 1346, 1491. A "taking" claim under the Fifth Amendment is a monetary claim that falls within the Tucket Act. See Ritter v. Army Corps. of Engineers, 874 F.2d 1236, 1243 (8th Cir. 1989) ("Under the Tucker Act, district court jurisdiction over inverse condemnation claims is

limited to $10,000 or less."); Minnesota by Noot v. Heckler, 718 F.2d 852, 857-58 (8th Cir. 1983). In Count II, Gunn's taking claim seeks monetary damages that exceed the jurisdictional amount. See Pl.'s Reply Mem. at 6. Therefore, the court grants the USDA's motion to dismiss Count II of the amended complaint for want of jurisdiction.

The court has considered transferring Count II to the Claims Court, but Gunn has not shown that he is entitled to compensation under an inverse condemnation theory.

V. The Inverse Condemnation Claim.

Regulatory action may constitute a taking requiring the government to pay fair compensation if it either physically invades the property of a private citizen or regulates the property in a way that eliminates all economically beneficial and productive uses of the property. Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1015 91992). Here, however, the government has not physically invaded Gunn's property nor eliminated all economically beneficial uses of part or all of the property. The USDA action merely renders Gunn ineligible for certain benefits under several federal farm programs if he farms the converted wetlands. This action is not a taking requiring that plaintiff be compensated under an inverse condemnation theory.

The clerk of court shall enter judgment dismissing plaintiff's complaint, with costs assessed to the plaintiff.

IT IS SO ORDERED.

Dated this 17th day of September, 1996.

/Charles R. Wolle/
CHARLES R. WOLLE, JUDGE
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

CHARLES GUNN, Plaintiff, vs. UNITED STATES DEPARTMENT OF AGRICULTURE, NATURAL RESOURCES CONSERVATION SERVICES, Defendants.	Case No. 4-95-CV-80373 AFFIDAVIT OF CHARLES GUNN

STATE OF IOWA)
) ss.
COUNTY OF GREENE)

I, Charles Gunn, being first duly sworn depose and state as follows:

1. I am the Plaintiff in the above-entitled matter.

2. The statements and allegations made herein are based on my own personal knowledge, information and beliefs.

3. After the above-captioned court affirmed the USDA's classification of my farmland, I appealed the decision to the Eighth Circuit Court of Appeals. The

Eighth Circuit issued its ruling on July 7, 1997, affirming the District Court. When I read the Decision, it became obvious that the appeals court misunderstood an important factual basis of my case. The appeals court claimed that I did not contest a finding that my farmland had significant wetland characteristics before the Drainage District work of 1992. That is not true. It has always been my position that, because of the drainage work done in 1906, my farm does not contain significant wetland characteristics.

4. Additionally, the USDA, previous to the 1991 classification was of the same opinion. In reviewing the administrative file filed with the above-captioned court, I noted that it did not contain a June 13, 1987 classification by the USDA finding "no wetlands" on my farm. I went to the Greene County, Iowa, local office and obtained a copy of the two page document. The document is attached as Exhibit "1".

5. Further Affiant sayeth naught.

/Charles Gunn/
Charles Gunn, Plaintiff

Subscribed and sworn to before me by the Plaintiff above, Charles Gunn, this 19th day of August, 1997.

/Janis A. Hamilton/
Notary Public--State of Iowa

HIGHLY ERODIBLE LAND AND WETLAND CONSERVATION DETERMINATION

. . . .

4. . . . Tract No. T1385

. . . .

SECTION II-WETLAND

12. . . . . Tract No. 1385 None.

. . . .

Date 6/13/87

Exhibit "1"

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

CHARLES GUNN,	)	Case No. 4-95-CV-80373
Plaintiff,	)	
vs.	)	
UNITED STATES DEPARTMENT OF AGRICULTURE, NATURAL RESOURCES CONSERVATION SERVICES,	)	
Defendants.	)	AFFIDAVIT OF CHARLES GUNN

STATE OF IOWA)
) ss.
GREENE COUNTY)

I, Charles Gunn, being first duly sworn depose and state as follows:

1. I am the Plaintiff in the above-entitled matter.

2. The statements and allegations made herein are based on my own personal knowledge, information, and belief.

3. I and other family members are the owners of farmland which is the subject of this litigation.

4. I am the third generation of my

family to farm the entire 160 acres affected by the Defendant's actions.

5. I have personally farmed said 160 acres since 1979 and have planted the farm in row crop production every year since that date.

6. I am the only farmer in Greene County Drainage District #5, containing approximately 4000 acres, to be adversely affected by the two and a half mile open ditch which was constructed in 1992. My neighbors have real estate containing similar soil types and existing drainage tyle systems, yet they were not deemed to have "converted wetlands".

7. In 1906, a 28-inch tile main, with several laterals, were installed in our property. When the open ditch was constructed in 1992, three additional "groups" of laterals were discovered. I feel even more laterals (running parallel) are contained in the property, however, I do not have tile records prior to the 1950's to prove their existence.

8. I feel the farm inspection (on site) after the ditch construction by the NRCS in 1993 is unfair to my case since it was the wettest year in recorded history and the NRCS did not take this into consideration.

9. I feel the entire 160 acres should be classified as "prior converted" wetland since it meets all the criteria of such and has been classified as cropland and planted to agricultural

commodities for as long as the government has kept records.

10. Beginning in 1993, the Defendant precluded me from farming portions of our land. In 1993, I could not farm 10.8 acres; in 1994, I could not farm 17.4 acres; in 1995 (and presumably for all years until the agency's actions are reversed), I cannot row crop 28.2 acres.

11. In effect, the Defendant's action "denies all economically beneficial or productive use" of the property that I cannot farm.

12. My primary concern in Count I is to get the Defendant's action reversed and the proper designation of my farmland so that I can again farm the 160 acres as I did prior to 1991. For the years my farming has been interrupted, I only seek compensation for what was lost due to the agency's conduct. I do not seek full compensation for the actual value of the unused acres for each year. In this regard, I estimate my loss for 1993 to be $1,080, 1994: $1,740; 1995: $2,820; ($2,820 for each year until the Court rules), for attorney fees, interest as provided by law, and the cost of this action.

13. In the alternative, if the Court should determine that the agency's actions are correct and lawful, then, as to Count II, I do request full compensation for the fair market value of the appropriate number of acres which

were taken, including the diminished value of the remaining 160 acres, for attorney fees, interest as provided by law, and the cost of this action.

14. I have personal knowledge of a 160 acre farm, located two miles from our land, which sold for $2,400 per acre, approximately two months ago.

15. In my opinion, the remaining land in our west 80 acres is substantially devalued due to the "converted wetland" designation and its extremely irregular cropping pattern, as mapped by the NRCS. I feel the remaining acres are worth no more than 50% of fair market value.

/Charles Gunn/
Charles Gunn, Plaintiff

Subscribed and sworn to before me by Charles Gunn on this 30th day of January, 1996.

/Janis A. Hamilton/
Notary Public In And For
The State Of Iowa

cc: Gary Hayward
Assistant U.S. Attorney
United States Courthouse Annex
2nd Floor, 110 East Court Avenue
Des Moines, Iowa 50309

HIGHLY ERODIBLE LAND AND WETLAND
CONSERVATION DETERMINATION

. . . .

5. . . . Tract No. T1385

. . . .

SECTION II-WETLAND

12. . . . . Farmed Wetlands(W). 32.9 total wetland acres.

. . . .

23. Date 4/26/1991

App. 38

HIGHLY ERODIBLE LAND AND WETLAND
CONSERVATION DETERMINATION

. . . .

5. . . . . Tract No. T1385

. . . .

SECTION II-WETLAND

12. . . . . Farmed Wetlands(W). 18.7 total wetland acres.

. . . .

22. Converted wetland. . . .drainage district action. 14.2 acres

. . . .

31. Date 11/13/92

App. 39

HIGHLY ERODIBLE LAND AND WETLAND
CONSERVATION DETERMINATION

. . . .

5. . . . . Tract No. T1385

. . . .

SECTION II-WETLAND

12. . . . . Farmed Wetlands(W). 16.8 total wetland acres.

. . . .

22. Converted wetland. . . .drainage district action. 10.8 acres

. . . .

31. Date 5/10/93

App. 40

HIGHLY ERODIBLE LAND AND WETLAND CONSERVATION DETERMINATION

. . . .

5. . . . . Tract No. T1385

. . . .

SECTION II-WETLAND

12. . . . . Farmed Wetlands(W). 4.5 total wetland acres.

. . . .

22. Converted wetland. . . .drainage district action. 28.2 acres

. . . .

31. Date 10/31/94

STATUTORY AND REGULATORY PROVISIONS

The statute defining what land is exempt from the "swampbuster" provisions of the Food Security Act of 1985[2], 16 U.S.C. Section 3801(a)(4)(A) reads in pertinent part as follows:

> "The term 'converted wetland' means wetland that has been drained, dredged, filled, leveled, or otherwise manipulated (including any activity that results in impairing or reducing the flow, circulation, or reach of water) for the purpose or to have the effect of making the production of an agricultural commodity possible if--
>
> (i) such production would not have been possible but for such action; and
>
> (ii) before such action--
>
> (I) such land was wetland; . . . ."

---

[2] Food Security Act of 1985, Public Law No. 99-198, 99 Stat. 1354. Its provisions are codified at 16 U.S.C. Sections 3801 through 3849. Swampbuster provisions are codified at 16 U.S.C. Sections 3821-3823.

The statute describing what land is covered by the "swampbuster" provisions of the Food Security Act of 1985, 16 U.S.C. Section 3801(a)(18), reads in pertinent part as follows:

> "The term 'wetland', except when such term is part of the term 'converted wetland' means land that--
>
> (A) Has a predominence of hydric soil;
>
> (B) Is is inunindated or saturated by surface or ground water at a frequency and duration sufficient to support a prevelance of hydrophytic vegetation typically adapted for life in saturated soil conditions; and
>
> (C) Under normal circumstances does support a prevelance of such vegetation."

The statute making production of an agricultural commodity on wetland converted after December 23, 1985 ileligible for USDA programs, 16 U.S.C. Section 3821(a), reads in pertinent part as follows:

> "Except as provided in Section 3822 and notwithstanding any other provision of law, following the date of enactment of this Act [December 23, 1985], any person who in any crop year produces as agricultural commodity on vonverted wetland should be ineligible for -- ****"

The statute exempting "converted wetland" from the "swampbuster" provisions of the Food Security Act of 1985, 16 U.S.C. Section 3822(b)(1)(A) reads in pertinent part as follows:

> "No person shall become ineligible under section 3821 for program loans, payments, and benefits: (1) As the result of the production of a crop of an agricultural commodity on: (A) converted wetland if the conversion of such wetland was commenced before December 23, 1985."

The agency regulation meant to implement the statute's exemption of"converted wetland", Paragraph 7 C.F.R. Section 12.5(d) reads in pertinent part as follows:

> "Exemptions for converted wetland. (1) A person shall not be determined to be ineligible for program benefits in accordance with Section 12.4 as the result of the production of a crop of an agricultural commodity on:
>
> (i) Converted wetland if the conversion of such wetland was commenced before December 23, 1985;"

The agency regulation meant to implement Congress' definition of "converted wetland", Paragraph 7 C.F.R. Section 12.2(a)(6) reads in pertinent part as follows:

> "Converted wetland means wetland that has been drained, dredged, filled, leveled, or otherwise manipulated (including any activity that results in impairing or reducing the flow, circulation, or reach of water) that makes possible the production of an agricultural commodity without further application of the manipulations described herein if (i) such production would not have been possible but for such action; and (ii), before such action such land was wetland and was neither highly erodible land nor highly erodible cropland."

The agency regulation meant to assist in the identification of "converted wetland", Paragraph 7 C.F.R. Section 12.32, in pertinent part, reads in pertinent part as follows:

> "Converted wetland identification criteria. (a) Converted wetland shall be identified by determining whether the wetland was altered so as to meet the definition of converted wetland set forth in Section 12.2(a)(6). In making this determination, the following factors are to be considered:
>
> . . . .
>
> (b) A wetland shall not be considered to be converted if:
>
> . . . .
>
> (2) It is determined that the actions of the person producing such agricultural commodity does not permanently alter or destroy natural wetland characteristics."